

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

11/05/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000556

FILED: \_\_\_\_\_

STATE OF ARIZONA

DIANA C HINZ

v.

ANTHONY WAYNE SMITH

W CLIFFORD GIRARD JR

FINANCIAL SERVICES-CCC  
PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5958215

Charge: DUI/ALCOHOL

DOB: 06/24/54

DOC: 09/27/00

This Court has jurisdiction of this misdemeanor criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument on October 7, 2002. This decision is made within



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30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has carefully reviewed the record of the proceedings from the Phoenix City Court, the exhibits made of record, and the Memoranda submitted by counsel.

The only issue presented for review is: Did the trial court err in denying both of Appellant's Motions for Mistrial?

Appellant was charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor offense in violation of A.R.S. Section 28-1381(A)(1); Driving with a Alcohol Concentration of .10 or greater within 2 Hours of Driving, a class 1 misdemeanor offense in violation of A.R.S. Section 28-1381(A)(2); and Failure to Yield While Making a left-hand Turn, a civil traffic matter in violation of A.R.S. Section 28-772. Appellant entered pleas of Not Guilty and Not Responsible. Appellant's trial proceeded with a jury from August 1 to 3, 2001. Appellant was found guilty of Driving While Under the Influence of Intoxicating Liquor, Not Guilty of Driving with a Blood Alcohol Concentration of .10 or Greater, and Responsible for the Failure to Yield While Making a left-hand Turn. Appellant asserts that the trial judge committed reversible error in denying his motions for mistrial after the prosecutor asked of Chester Flaxmayer (a defense witness), "is that why the legislature wound-up finally going to - -."<sup>1</sup> A vigilant counsel for the Appellant objected and the trial judge sustained the objection. Counsel and the court clearly understood that the prosecutor was going to ask Mr. Flaxmayer if that was why the legislature wound-up finally going to a higher (.08) level of legal impairment. Appellant's counsel requested that the trial judge instruct the jury to disregard the prosecutor's question. The trial judge so instructed the jury, and Appellant's counsel again moved for a mistrial. Both motions were denied by the trial judge.

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<sup>1</sup> R.T. of August 2, 2001, at 203.  
Docket Code 513



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Generally, the trial judge is in the best position to evaluate the grounds alleged for a mistrial.<sup>2</sup> Whether to grant or deny a request for a mistrial is a matter within the sound discretion of a trial judge, and in the absence of an abuse of discretion, such decision will not be reversed on appeal.<sup>3</sup> Appellee contends that the prosecutor's question was not improper. Certainly counsel, the trial judge, and this court understand the information that the prosecutor was attempting to elicit from Mr. Flaxmayer. Though the prosecutor did not quite get out the entire question, it was clear from the portion of the prosecutor's question that she was asking about a change made in the DUI laws by the legislature. It is also clear, that the question was improper, as it called for an answer not relevant to the charges pending against Appellant. The trial judge properly sustained Appellant's counsel's objection to the prosecutor's question.

Appellant argues that the prosecutor's question was intentional misconduct warranting a dismissal of the charges. Such a remedy appears harsh and inappropriate to the facts of this case. Here, the prosecutor did not engage in a course of conduct, or a series of acts or questions designed to improperly influence the jury.

Finding error in the prosecutor's question, this Court must determine whether the error was harmless. Specifically, this Court must not reverse a jury's verdict where there is substantial evidence within the record to support that verdict, and the record clearly reflects that the error could not have contributed, beyond a reasonable doubt, to the jury's verdict.<sup>4</sup> There is substantial evidence to support the jury's verdict in this case and the quantity and quality of the evidence makes it clear, beyond a reasonable doubt, that the prosecutor's improper

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<sup>2</sup> State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983).

<sup>3</sup> State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995); State v. Schroeder, 167 Ariz. 47, 804 P.2d 776 (App. 1990).

<sup>4</sup> State v. Leon, 190 Ariz. 159, 945 P.2d 1290 (1997); State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973).



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question did not contribute to the jury's verdict. The record specifically reveals two civilian witnesses (Rhonda Rogers and Terry DeGarmo) and Phoenix Police Officer John Garza, made similar observations that Appellant's eyes were bloodshot, glassy, he looked like he was dazed, he smelled of alcohol, and appeared unsteady on his feet.<sup>5</sup> Appellant performed poorly on the field sobriety test, exhibited four of the six cues of the Horizontal Gaze Nystagmus(HGN) test, frequently lost his balance during his encounter with the police officer, admitted drinking four beers within a period of one hour, and was tested to show a .10 and .102 blood alcohol content after an intoxilyzer test.<sup>6</sup>

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all future and further proceedings in this case.

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<sup>5</sup> R.T. of August 1, 2001, at 26-27, 41-43, 57-58.

<sup>6</sup> Id. at 70-72, 83. R.T. of August 2, 2001, at pages 154-55.